In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1076

DEANE HILL COUNTRY CLUB, INC. and All of Its Members, Claimants (13 Coin-Operated Gaming Devices and Their Coin Contents), PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A3) is reported at 342 F. 2d 794.

JURISDICTION

The judgment of the court of appeals was filed on March 23, 1965. The petition for a writ of certiorari was filed on April 16, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an incorporated, member-owned country club is required by 26 U.S.C. 4461(a) and

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4901(a) to purchase a gambling tax stamp as a precondition to operating coin-operated gaming machines whose use is restricted to members only.

2. Whether the coin-operated gaming machines and their contents seized from petitioner were properly forfeited.

STATEMENT

On October 4, 1962, agents of the Internal Revenue Service, acting pursuant to a search warrant, seized thirteen coin-operated gambling machines from the premises of petitioner, an incorporated, member-owned country club (R. 44a, 47a–48a).[1] The machines were in operation at the time of the seizure without the required gambling tax stamp being affixed (R. 48a), and petitioner was able to show no evidence that the required tax had been paid (R. 49a). Instead, the agents were shown two checks and a partially-filled out Form 11–B, which omitted both the amount owed and the number of machines in operation (R. 57a–58a).

The warrant for the seizure was obtained by an agent who, on September 30, 1962, had been with his family as an invited dinner guest at the country club (R. 59a). While there he had entered a room with doors open, in which he observed the gambling machines being operated (R. 55a–56a). He thereafter had the records of the acting district director of Internal Revenue at Nashville searched. The

[1] "R." refers to the appendix filed by petitioner in the court of appeals.

search disclosed that no stamp was purchased and no return filed for the machines (R. 56a). An affidavit to this effect was filed with the agent's affidavit for the search warrant (R. 57a).

A sign on the door to the room read "Members Only" (R. 104a), and a sign on each machine stated that only club members were permitted to play it (R. 83a–84a). The club president admitted that non-members may have played the machines from time to time, but he stated that if they were observed doing so they were requested to cease (R. 86a–87a). It was also admitted that there was no policy against guests entering the room to watch the members play (R. 113a–114a).

It was claimed on behalf of petitioner that a return had been filed and a check submitted on August 31, 1962, but that they were returned because the check was for too great an amount, and that a second check for the correct amount was drawn and signed but not mailed because of inadvertence (R. 42a–43a, 78a). However, Internal Revenue procedure is to keep the return and mail back only the check in such instances (R. 73a). There would be a card record of such overpayment and a copy of the covering letter in the files, and a search disclosed neither in respect to petitioner (R. 72a, 74a).[2] On October 4, after the seizure, the president and manager of petitioner flew to

[2] Petitioner had previously failed to pay the tax for the July–December 1961 period (R. 111a). The district court found that the contention that petitioner attempted to pay the tax at the proper time "is supported by cloudy evidence" (R. 24a).

Nashville and purchased a tax stamp retroactive to September 1 (R. 70a).

ARGUMENT

1. Petitioner was clearly required by 26 U.S.C. 4901(a) to purchase a tax stamp as a precondition to operating the machines. Even assuming that use of the machines was effectively limited to members and barred to guests, petitioner, as a corporation, is nevertheless a separate entity from its members.[3] Use of the machines by the members therefore constituted gambling. As the district court pointed out (R. 24a), the benefits which petitioner gained from operation of the machines extended to members who were non-players as well as to those who were players.

2. The warrant for seizure of the machines was properly issued upon probable cause. The agent was an invitee upon the premises, and did not lose that status merely because, having observed the machines in operation through an open door, he entered the room to inspect more closely. The entry was made openly and without stealth. Unlike the agent in *Gouled* v. *United States,* 255 U.S. 298, the agent did not conduct a search or seizure and did not act secretly in the absence of the owners. In light of the testimony

[3] Petitioner attempts to support its contention that § 4901(a) is inapplicable to it by intervening, appealing, and bringing this petition in the name of "all of its members." No individual member, however, has a direct interest in the machines, but only an indirect interest by virtue of his interest in the corporation. There is, therefore, in this case, only one petitioner, not many.

that guests were requested merely to refrain from playing the machines, and not to leave the room (notwithstanding the sign at the entrance), the agent cannot be deemed even a technical trespasser.[4]

The operation of the machines was governed by § 7302, and not by 26 U.S.C. 7301(a) (which deals with sale, removal or concealment of taxable property). Hence, it was necessary to prove only that the tax had not been paid and that the machines had nonetheless been willfully (rather than inadvertently) operated. *Voglino* v. *United States,* 253 F. 2d 794 (C.A. 4), certiorari denied, 357 U.S. 919. The trial court could reasonably draw the inference that the machines in use at the time of the seizure were the same ones which the agent had observed in operation four days previously. More specific identification was not required.

Petitioner, having operated the machines unlawfully, could not undo the offense by paying the tax after seizure. Even had the official who issued the tax stamp been aware of the previous unlawful operation and resultant seizure, he would have been without authority to waive the effect of the relevant statutes. But, in any event, there is no showing that he knew of the seizure at the time that the stamp was purchased.

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[4] There is no basis for the contention that the agent could lawfully have seized the machines only at the time he observed them in operation but could not use the information thereby obtained as the basis for a warrant justifying a later seizure (Pet. 9). The agent, being alone and off duty, did not have the facilities to seize and remove the machines at the time that he observed them.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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